# CONSERVATOR ALLOWED WIDE LATITUDE IN ACTING FOR INCOMPETENT IN DIVORCE ACTION

*Newman v. Newman*
*42 Ill. App. 2d 203, 191 N.E.2d 614 (1963)*

A husband brought suit for divorce charging his wife with extreme and repeated cruelty. The divorce decree incorporated provisions of an earlier property settlement agreement between the parties. At no time during the divorce proceedings was there raised any question with respect to the wife's mental capacity. Yet less than four months after the divorce decree was entered the wife was adjudged an incompetent and a conservator was appointed by the probate court. A little over a year from the date of the divorce decree, the wife's conservator requested and was given leave to appear for the wife and present her petition asking that the divorce decree be vacated.[1]

The wife's petition alleged that by reason of her mental incapacity she was incapable of exercising sufficient judgment to consent to the divorce decree and was thereby deprived of the opportunity of defending the suit. The wife's petition alleged that since she was mentally disabled she was not guilty of the acts of cruelty charged as grounds for the divorce.[2] The husband's answer alleged that at all times relevant to the divorce the wife had been competent. The conservator thereafter filed another petition with the circuit court, wherein he stated that due to the uncertainties and expense of the pending litigation, and in accord with an order of the probate court advising it, he proposed to accept a settlement offered by the husband. The circuit court then entered an order modifying the original decree in accordance with the settlement offered by the husband and approved by the conservator.

A year and a half later, on June 12, 1962, the wife filed a new petition alleging that she had had her civil rights restored and was no longer institutionalized. She prayed that the divorce decree be further modified to require the husband to pay her an increased sum per week. The husband denied the jurisdiction of the court on the ground that the divorce decree provided for a property settlement in lieu of alimony. The trial court held that the modifying order by the circuit court of the original decree was of no effect. The trial court further held that since the original decree provided for alimony, it was possible to modify the agreement. The trial court then awarded the wife an increased sum per month as permanent alimony.

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[1] The divorce decree was entered on February 6, 1959. The wife's conservator was given leave to appear for her and present her petition on March 1, 1960.

[2] The wife's petition noted various instances of hospitalization and psychiatric treatment extending over the period from January 1955 to February 1959, and referred to suicide attempts and insulin shock treaments administered. Newman v. Newman, 42 Ill. App. 2d 203, 191 N.E.2d 614 (1963).

The husband appealed to the Appellate Court of Illinois and that court reversed the trial court. The appellate court, one judge dissenting, held that the order of the circuit court was immune from collateral attack. The court further held that the settlement entered into by the conservator was a property settlement in lieu of alimony and as such barred the wife from asserting any right to alimony. The court held that the conservator had authority pursuant to the order of the probate court to set aside the divorce. Having authority to attempt to set aside the divorce decree, the conservator had authority as well to enter into the settlement that modified the divorce decree. Finding the first modification order of the circuit court binding, the appellate court held that the restoration to the wife of her civil rights did not permit her to lay claim to any right that she had effectively waived through the action of her conservator.[3]

It is difficult to see how the court could reach the decision it did upon the facts of the case. The agreement originally made by the parties prior to the divorce proceedings, and later incorporated into the divorce decree, was termed by the parties a property settlement agreement. This agreement provided a release by the defendant whereby the defendant agreed to relinquish all claims whatsoever upon the husband for alimony, support, and maintenance, under the laws of the State of Illinois except as provided in the property agreement itself. The divorce decree, having adopted the property settlement agreement, provided that the parties were barred from ever asserting any rights of dower, curtesy, or alimony against each other.[4]

The appellate court in its opinion makes reference to the modification of the original decree, saying that "the modification of decree order of November 28, 1960, set forth and again approves a property settlement in lieu of alimony, and defendant does not contend otherwise." [5]

Although the language of the appellate court speaks of the original decree as being one of a property settlement in lieu of alimony, such an interpretation by the appellate court would render its decision inherently inconsistent. If the original decree contained a property settlement in lieu of alimony, the trial court could not, under the Illinois statute, have entered any modification of its original decree.[6]

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[3] Newman v. Newman, *supra* note 2.

[4] The language of the original agreement stated: "That the parties hereto are forever barred from asserting any rights to dower, curtesy, or alimony against each other, except as provided in the said property agreement. . . ."

The language of the original decree declared that: "The Wife hereby: (a) relinquishes all claims whatsoever for alimony, support and maintenance . . . except the right to demand performance of all the undertakings of the Husband contained in this agreement. . . ."

[5] Newman v. Newman, *supra* note 2.

[6] Ill. Rev. Stat. ch. 40, § 19 (1961). This statute provides:

> Irrespective of whether the court has or has not in its decree made an order for the payment of alimony or support, it may at any time after entry of a decree . . . make such order for the payment of alimony and maintenance of the spouse . . . as, from the evidence and nature of the case,

That the original decree did in fact contain a provision for *alimony* seems clear. The original agreement provided that the wife was to receive specified weekly sums of money for support to be terminable at the end of 102 weeks or the wife's death or remarriage.

When a divorce decree provides for payments to be paid for an indefinite period of time, the decree is one for ordinary alimony and not a lump sum in lieu of alimony.[7] The payments to the defendant were uncertain as to sum and period of time since they depended upon her remaining alive and not remarrying. Thus the original agreement provided for ordinary alimony and could have been altered by the court in the instant case.[8]

The agreement, as noted earlier, contained as well a waiver of alimony by the defendant except as provided in the agreement. However, such waivers have been ignored by the courts where an award is made contingent upon the death or remarriage of one of the parties.[9]

Assuming the position of the appellate court to be that the original decree was for ordinary alimony, their only consistent position would be that the circuit court in modifying the original decree converted the earlier award of alimony into a lump sum property settlement in lieu of alimony.

The agreement contained in the modification order of the circuit court probably was a property settlement in lieu of alimony. In this agreement the plaintiff made the award a charge upon his estate in the event of his death prior to full payment, and not subject to defeasance by reason of the death or remarriage of either himself or his wife.[10]

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shall be fit, reasonable and just, but no such order subsequent to the decree may be made in any case in which the decree recited that there has been an express waiver of alimony or a money or property settlement in lieu of alimony or where the court in its decree has denied alimony.

[7] Adler v. Adler, 373 Ill. 361, 26 N.E. 504 (1940); Walters v. Walters, 341 Ill. App. 561, 94 N.E.2d 726 (1950); 2A Nelson, Divorce and Annulment § 17.06, at 48 (2d ed. 1961). In Walters v. Walters, the court states that alimony is for an indefinite period of time and usually for an indefinite total sum, whereas a property settlement is always for a definite length of time and a sum certain.

[8] Adler v. Adler, *supra* note 7.

[9] Loeb v. Gendel, 29 Ill. App. 2d 155, 172 N.E.2d 408 (1962) (dictum). In *Loeb* the decree provided that it was expressly understood that the payment constituted a lump sum settlement in lieu of alimony. However, the court held that this language did not provide for a lump sum where the payments were not of a sum certain.

[10] The language in the modification order to the original decree cleared up the earlier problem of the agreement not being for a sum certain as it provided that:

> Payments herein shall be made to the Conservator of the estate of the said Incompetent Defendant until such time as the said incompetence is removed, in which event he shall make balance of payments directly to her, and the said sum . . . shall not be subject to defeasance by reason of the death or remarriage of either plaintiff or defendant and shall be a charge against the estate of the plaintiff in the event of his death prior to the full satisfaction thereof.

Having established that the modification order contained a property settlement, the question arises as to whether the circuit court had authority to modify the decree. When the original divorce decree became final, the wife's only way of attacking the decree was to petition through her conservator that the decree be vacated under Section 72 of the Civil Practice Act on the ground that she was mentally disturbed at the time the decree was entered. The wife's sole prayer in her petition was that the divorce decree be vacated.

Though Section 72 of the Civil Practice Act does not affirmatively so state, it is quite probable that the only relief that could have been given the wife under the statute would have been setting aside the divorce decree. Section 72 is a codification of the common law writ of error coram nobis. Although the writ of error coram nobis, as such, was expressly abolished by section 72 the essentials of the common law coram nobis have been retained in proceedings brought under the statute. Under the writ of error coram nobis, the only relief which could be granted was the setting aside of a judgment and the granting of a new trial.[11]

The history of the writ of error coram nobis suggests that were the circuit court to have first conducted a hearing on the question of the validity of the divorce itself, there would have still been strong doubt as to the circuit court's jurisdiction to reach the question of the original property agreement. However no such hearing was conducted. The circuit court dismissed the issues presented in the petition and ordered a modification of the decree on the theory proposed by the husband and accepted by the conservator, that the controversy over the validity of the decree would be protracted and expensive to both parties and fraught with difficulties. Under the wife's petition nothing was before the court except the question of the validity of the decree. The petition did not ask for a modification of the property agreement; it could not. Yet as noted by the dissent, the settlement was "a complete abdication of the defendant's position and, in effect, withdrawal of defendant's petition—the basic pleading of the case." [12] That the court had the power to reach the property agreement under any circumstances is doubtful. Assuming, however, that one of the parties was mentally incompetent, the action of the circuit court was even more censurable.

The last question raised by the *Newman* case involves the power of a conservator to act for an incompetent. The powers of a conservator are governed by statute, and no express authorization can be found in the statute empowering a conservator to waive alimony and enter into a property settlement.[13] The power exercised by the conservator and approved by

[11] People *ex rel.* Waite v. Bristow, 391 Ill. 101, 62 N.E.2d 545 (1945). Vol. 30A Am. Jur. *Judgments* § 740 (1958) states: "The merits of the original controversy are not in issue in coram nobis proceedings. In this connection, it has been held that the writ will not reach matters actually determined in the original proceedings. . . ."

[12] Newman v. Newman, *supra* note 2, at 208, 191 N.E.2d at 618.

[13] Ill. Rev. Stat. ch. 3 § 215 (1961):

By leave of court without notice or upon such notice as the court directs an executor, administrator, guardian or conservator may compound

the appellate court, that of dropping the prayer to vacate, even transcends that of waiving an incompetent's right to alimony. In his exercise of power the conservator effectively paralleled an action whereby he could bring suit for divorce in the name of an incompetent, an action contravening public policy favoring the stability of marriage and clearly beyond a conservator's power.[14]

Acting on strong evidence of fraud in the divorce decree, the conservator filed a petition seeking to vacate that decree. No mention was made in the petition of a modification of the earlier property agreement. What, then, did the proposed settlement accepted by the conservator purport to settle? Even assuming the doubtful contention of the appellate court that the circuit court had jurisdiction to consider a modification of the property agreement, the only way the ciruit court could have modified the decree would have to have been premised upon the court first finding that the wife's prayer was unsupportable by the evidence. Only by denying to the wife her prayer that the divorce decree should be vacated could the court then modify the existing decree. Yet without such a determination the conservator accepted a settlement that settled little except that the defendant had abdicated her right to preserve her marriage.

The appellate court states that if the action of a conservator can be shown to be beneficial to the welfare of a ward, courts have permitted such rights to be exercised on behalf of the ward. The settlement that modified the original decree was not beneficial to the wife. By its terms the settlement precluded any future readjustment as would exist in ordinary alimony awards.[15]

Had the conservator consciously set out to work against the wife, he could not have acted more against her interests. Had the wife been successful in her suit to vacate the divorce decree she would have been in a better position than after the settlement. Had she not prevailed in her action she would still have had alimony and would have been in a better position than after the settlement. The wife's conservator effectively destroyed her past and future rights without materially bettering her financial position, and it is difficult to see how he could have the power to act so detrimentally to her interests.

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or compromise any claim or interest of the ward or the decedent in any personal estate or exchange any claim or any interest in personal estate for other claims or personal estate upon such terms as the court directs.

[14] Ill. Rev. Stat. ch 40, § 19 (1961).

[15] In accepting a settlement the conservator barred the wife from seeking to set aside the divorce decree and in effect made the decree binding much the same as if he had sued for the divorce for the wife.